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THE PUBLIC TRUST DOCTRINE AND THE IMPOSSIBILITY OF "TAKINGS" BY WILDLIFE

Anna R. C. Caspersen*

I. INTRODUCTION

The reintroduction of seven pairs of gray wolves into Yellowstone National Park in February of 1995¹ sparked a debate between Secretary of the Interior Bruce Babbitt and United States Representative Helen Chenoweth² that aptly illustrates the significant divide in American public opinion concerning the issue of wildlife protection.³ Babbitt hailed the reintroduction of the gray wolf into Yellowstone as "an important and historic chapter in American history."⁴ Chenoweth, in stark contrast, viewed the wolves as "trespasse[rs] onto the lands of Idaho,"⁵ and Babbitt himself as a "trespasse[r] onto the Constitution of the United States."⁶

The disagreement as to whether wildlife should be protected even on privately owned lands started long before the reintroduction of the gray wolf into Yellowstone.⁷ The 1960s began an era of awareness of the fragile and finite quality of our natural resources, specifically

* Managing Editor, 1995-1996, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

¹ Tom Kenworthy, *Babbitt Finds Relocation Program Has Hill's Wolves Growling at Him*, WASH. POST, Jan. 27, 1995, at A23 (15 Canadian gray wolves were released into central Idaho in January, 1995, and 14 wolves were released into Yellowstone in February, 1995).

² *Id.* Chenoweth (R-Idaho) is infamous among environmentalists for questioning whether salmon can be endangered when it is readily available in supermarkets. *Id.*

³ *Id.*

⁴ *Id.* The gray wolf, exterminated from the West half a decade ago, was the only original wildlife missing from the park. *Id.*

⁵ *Id.* Chenoweth suggested that a better solution for controlling Yellowstone's unmanageably large elk population would be to have a hunting season in Yellowstone. *Id.*

⁶ Kenworthy, *supra* note 1, at A23.

⁷ See Douglas H. Chadwick, *Dead or Alive, The Endangered Species Act*, NAT'L GEOGRAPHIC,

wildlife, that culminated in the passage of the Endangered Species Act in 1973.⁸ Today, when remarks such as Chenoweth's indicate a political backlash against the protection of wildlife, it becomes even more crucial to pinpoint if there is a right to insist on wildlife protection, and if there is, where the right comes from and how it can be defended.⁹

Many people believe there is a special duty to preserve wildlife, whether motivated by the desire to emulate Noah and his Ark by saving God's creatures, or by the belief that we have much to learn scientifically from other animals.¹⁰ Victor Hugo suggested that, "[i]n the relations of man with animals, with the flowers, with the objects of creation, there is a great ethic, scarcely perceived as yet, which will at length break forth into light."¹¹ This special duty, or "great ethic," to which Hugo refers is recognized legally in the ancient doctrine of the public trust.¹²

The public trust doctrine creates a legal obligation for the state to hold certain natural resources in trust for the people, and a duty for the state to protect and to preserve these resources.¹³ As Professor Joseph Sax commented in his landmark article, *The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention*, "[o]f all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems."¹⁴ The public trust doctrine has continued to stress the duty to protect and preserve natural resources as the doctrine has expanded its breadth to meet the challenges to natural resources posed by modern day America.

This Comment argues that just as wolves have not "trespassed" onto the lands of Idaho,¹⁵ those advocating the protection of wildlife

March 1995, at 7. Chadwick states that the 1960s began an "era of new found environmental awareness . . ." *Id.*

⁸ The Endangered Species Act, 16 U.S.C. § 1531 (1994); Chadwick, *supra* note 7, at 7.

⁹ See Kenworthy, *supra* note 1, at A23 (the House Public Lands and Resources Committee is dominated now by conservative Republicans such as Chenoweth and Barbara Cubin (R-Wyo)).

¹⁰ See Chadwick, *supra* note 7, at 12.

¹¹ *Id.* at 7.

¹² See Joseph L. Sax, *The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 473 (1970) [hereinafter Sax, *The Public Trust Doctrine*] (the public trust doctrine allows private citizens to sue on behalf of the interests of the public at large).

¹³ See *id.* at 486-87 for Sax's outline of the public trust doctrine.

¹⁴ *Id.* at 474.

¹⁵ Wolves were eliminated from the Northern Rockies 50 years ago when they were "poisoned,

are not "trespassing" onto the Constitution of the United States.¹⁶ Those who find the protection of wildlife to be a trespass on the Constitution point to the provision of the Fifth Amendment, which states "[n]or shall private property be taken for public use without just compensation."¹⁷ Some private landowners, loggers, and ranchers argue that efforts to protect wildlife that result in restrictions on land usage, or that increase the risk that livestock may be attacked, constitute a "taking" of private property requiring compensation.¹⁸ This Comment takes the position that the public trust doctrine trumps the Fifth Amendment prohibition against takings without compensation in regards to wildlife.¹⁹ The premise of this argument is that wildlife, like water and air, is held in trust by the government for the public's benefit.²⁰ The public trust doctrine holds that wild animals' right to use land to forage and find shelter existed prior to the property rights of private landowners.²¹ Therefore, when wildlife causes damage to private property,²² no taking occurs and the government is not responsible for compensation.²³

Section II of this Comment outlines the evolution of the public trust doctrine through the doctrine's early history and pays particular at-

shot, doused with gasoline, drawn and quartered and otherwise slaughtered to make the Northern Rockies safe for cattle and sheep." Sharon Begley and Daniel Glick, *The Return of the Native*, NEWSWEEK, Jan. 23, 1995, at 53.

¹⁶ See Kenworthy, *supra* note 1, at A23.

¹⁷ U.S. CONST. amend. V.

¹⁸ See, e.g., Chadwick, *supra* note 7, at 30 (a timberman from Oregon states "[t]he feds say to protect the owls and salmon we need a 300-foot setback from streams even on company lands. I think that's a 'taking' of private property."); Michael Milstein, *Wolves Return to Yellowstone Homeward Bound; Biologists Ranchers View Reintroduction Plan Differently*, THE SAN DIEGO UNION-TRIB., Jan. 18, 1995, at E-1 (the American Farm Bureau Federation fears wolves will burden ranchers and become "[a] convenient tool for environmentalists wanting to lock up public lands."); but see William K. Stevens, *Triumph and Loss As Wolves Return to Yellowstone*, N.Y. TIMES, Sept. 12, 1995 at C4. (Since reintroduction, wolves have not killed any livestock and experience shows "[w]olves prefer the wild game with which they have evolved over the millenniums.").

¹⁹ See Thomas A. Campbell, *The Public Trust, What's it Worth?*, 34 NAT. RESOURCES J. 73, 86-7 (1994) (suggesting there is no taking when private lands are preserved for the public).

²⁰ See *infra* notes 99-115 and accompanying text.

²¹ See Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723, 735 (1989) (arguing it is in human interest to include the protection of wildlife in the sphere of the public trust doctrine).

²² The Yellowstone wolves will help to keep the park's herds of bison (4,000), deer (30,000), and elk (60,000) healthy by culling the population by an estimated 1,200 annually by the year 2002. They are also expected to kill up to 20 cattle and 110 sheep. Begley and Glick, *supra* note 15, at 53.

²³ Meyers, *supra* note 21, at 735.

tention to the theoretical roots of the doctrine that are the underpinnings of its relevance to the protection of wildlife today.²⁴ Section III of this Comment discusses the development of the public trust doctrine in modern American case law, and focuses on the doctrine's marked expansion.²⁵ Section IV of this Comment establishes the grounds for including wildlife within the scope of the public trust doctrine.²⁶ Finally, Section V of this Comment argues that the public trust doctrine offers a solution to the current controversy surrounding "takings" by wild animals such as the gray wolf.²⁷

II. THE PUBLIC TRUST DOCTRINE

The public trust doctrine, and the corresponding idea that wildlife is owned by all of us, has its foundation in Roman law.²⁸ The Romans developed the public trust doctrine to explain the ownership status of things that cannot readily be possessed by individuals, such as the air, the water, and wildlife.²⁹ The Romans categorized these elements as held in trust by the government for the use and enjoyment of everyone.³⁰ This concept was incorporated in the laws of Medieval England where, although the King officially owned all "public" land, the public trust doctrine established the commoners' right to use the King's land.³¹ The King's land was therefore "immemorial liable to certain general rights of egress and regress, for fishing, trading, and other uses claimed and used by his subjects."³² From English law, the public trust doctrine followed colonists to North America.³³ After the American Revolution, when there was no longer a King to hold the public trust, the responsibility passed intact to the several states, where it remains today.³⁴

²⁴ See *infra* notes 28–115 and accompanying text.

²⁵ See *infra* notes 116–64 and accompanying text.

²⁶ See *infra* notes 165–249 and accompanying text.

²⁷ See *infra* notes 250–99 and accompanying text.

²⁸ Sax, *The Public Trust Doctrine*, *supra* note 12, at 474.

²⁹ Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 186 (1980) [hereinafter Sax, *Liberating the Public Trust Doctrine*].

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Paul Sarahan, *Wetlands Protection Post-Lucas: Implications of the Public Trust Doctrine on Takings Analysis*, 13 VA. ENVTL. L.J. 537, 558 (1994).

³⁴ *Id.*

A. A General Explanation

The concept behind the public trust doctrine is a simple one: certain public resources are enjoyed by everyone, and these resources are subject to demands which necessitate that the state act as trustee to prevent their abuse.³⁵ Nevertheless, there is much confusion and debate among legal scholars as to the authority and ultimate scope of the public trust doctrine.³⁶

A helpful way of understanding the public trust doctrine is to look to the doctrine's parallels with private trusts.³⁷ As with private trusts, there are four key elements to a public trust.³⁸ First, there must be the "res," the object or thing with which the trust is concerned.³⁹ In a public trust this is any wild element that cannot be owned individually, such as air, water, and—most importantly for the purposes of this Comment—wildlife.⁴⁰ Second, there must be a trustee, who is charged with the responsibility of acting in the best interests of the trust.⁴¹ The trustee's duty is to manage the assets to further the purposes of the trust.⁴² In a public trust, the trustee is the state. The third element of a trust is the beneficiary, who holds the real or "equitable" title to the assets of the trust.⁴³ It is the beneficiary whom the trustee seeks to benefit in the management of the trust.⁴⁴ In a public trust, the beneficiary of the trust is the public. Finally, there is the "settlor," the creator of the assets of the trust.⁴⁵ In a public trust protecting wildlife, the settlor "depends on your theological inclinations."⁴⁶

³⁵ See ZYGMUNT J. B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 374–75 (1992) (explaining how the public trust doctrine is related to the concept of a private trust).

³⁶ See *id.* at 412. Professor Plater notes that "the trust's antagonists have not yet found a countervailing momentum to the evolution of public trust case law. At some level, no matter how uncertain its ultimate trajectory, the doctrine appears to fulfill some old and newly re-discovered needs." *Id.* at 411.

³⁷ *Id.* at 375; see also JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 435–41 (4th ed. 1990) (for more on the traditional structure of trusts).

³⁸ PLATER ET AL., *supra* note 35, at 374–75.

³⁹ *Id.* at 375.

⁴⁰ See *infra* notes 165–69 and accompanying text.

⁴¹ PLATER ET AL., *supra* note 35, at 374.

⁴² *Id.*

⁴³ *Id.* at 375.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ PLATER ET AL., *supra* note 35, at 375. Advocates of the public trust doctrine are content to leave the identity of the settlor open, suggesting God, Mother Nature, or natural law as the creator of the trust. In contrast to the majority of legal scholars writing about the public trust

The public trust doctrine recognizes the public's common concern with the maintenance and purity of natural resources and protects these resources from "... the destabilizing disappointment of expectations held in common but without formal recognition such as title."⁴⁷ These global expectations held in common are vulnerable to what has been described as the "tyranny of small decisions."⁴⁸ This term describes small individual decisions that alone have a negligible impact on a resource, but when multiplied by hundreds of similar small decisions can have a major effect on the environment.⁴⁹ The irony is that if all the people who made this small decision had been informed of the group impact, most may have chosen to abstain.⁵⁰ The public trust doctrine serves to act as the guardian of the collective environmental consciousness.⁵¹

B. Roman Origins

The public trust doctrine originated in Roman law as part of the Romans' efforts at rational classification.⁵² The Romans found that in the realm outside of private property there were several categories

doctrine, Professor James L. Huffman, one of the public trust doctrine's greatest critics, argues that the public trust doctrine cannot be understood as a trust without a concrete settlor. Professor Huffman claims that without a settlor, the "terms of the trust" cannot be determined and that, "[i]n a society of laws where people have expectations built upon the foundation of property rights, something a bit more certain is required." James L. Huffman, *A Fish Out of Water: The Public Trust in a Constitutional Democracy*, 19 ENVTL. L. 527, 538, 542 (1989) [hereinafter Huffman, *A Fish Out of Water*]; but see Timothy Patrick Brady, Note, "But Most of it Belongs to Those Yet to be Born:" *The Public Trust Doctrine, NEPA, and the Stewardship Ethic*, 17 B.C. ENVTL. AFF. L. REV. 621, 622 (1990) (as far back as the story of Adam and Eve, where God created Eden for the common possession of Adam, Eve, and their children, it is taught that "the perfect state is not the private possession of property, but common ownership"); Sax, *The Public Trust Doctrine*, *supra* note 12, at 474 (just as there are expectations built on private property rights, there are also public expectations as to the maintenance of wild resources that only can be protected through the public trust).

⁴⁷ Sax, *Liberating the Public Trust Doctrine*, *supra* note 29, at 186-94.

⁴⁸ Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 HARV. ENVTL. L. REV. 393, 424 (1991) (citing William Odum, *Environmental Degradation and the Tyranny of Small Decisions*, 32 BIOSCIENCE 728, 728 (1982)).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See Sax, *The Public Trust Doctrine*, *supra* note 12, at 559-60. Sax states that in public trust cases frequently "[a] diffuse majority is made subject to the will of a concerted minority. For self-interested minorities often have an undue influence on the public resource decisions of legislative and administrative bodies and cause these bodies to ignore broadly based public interests." *Id.*

⁵² Sax, *Liberating the Public Trust Doctrine*, *supra* note 29, at 186 n.6.

of items and elements that could not be owned individually.⁵³ There were temples owned by the gods, public buildings owned by the state, and natural elements such as air, water, and wildlife that were owned in common by everyone, or by no one.⁵⁴ The Latin terms for the latter type of ownership are *res communis* and *res nullius*.⁵⁵ *Res communis* described things that were the property of everyone, such as water, air, and light.⁵⁶ *Res nullius* referred to things that were incapable of belonging to anyone—the Romans included wild animals among such things.⁵⁷

Roman public trust law is most detailed about water rights, for it was water, of all resources, that was subject to the greatest public demand.⁵⁸ Critics of the expansion of the public trust doctrine claim that when the Roman Emperor Justinian stated, “[b]y the law of nature, these things are common to mankind: the air, running water, the sea, and consequently the shores of the sea . . .,”⁵⁹ he was expressing the intention to limit the doctrine strictly to water rights.⁶⁰ Yet Roman law held that wildlife was held in common possession.⁶¹ The fact that Roman law focused on navigable waters rather than on wildlife, was due to public need and was not a limitation of the doctrine.⁶² Moreover, the public trust doctrine has evolved so much over time that it is wrong to depend on ancient Roman law as a modern day legal precedent.⁶³ Roman public trust law’s importance today lies

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Daniel R. Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases about the Environment*, 64 CORNELL L. REV. 761, 802 (1979).

⁵⁷ *Id.* at 803 n.196.

⁵⁸ See Scott W. Reed, *The Public Trust Doctrine: Is It Amphibious?*, 1 ENVTL. LAW & LITIG. 107, 111 (1986) (the relationship of the public trust doctrine to water rights is the result of water resources being subject to great public demand).

⁵⁹ THOMAS C. SANDERS, *THE INSTITUTES OF JUSTINIAN WITH ENGLISH INTRODUCTION, TRANSLATION, AND NOTES*, 158 (1984).

⁶⁰ Critics suggest this limitation even though Justinian explicitly also mentioned air. See Huffman, *A Fish Out of Water*, *supra* note 46, at 544–45; see also Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 634 n.12 (1986).

⁶¹ *Geer v. Connecticut*, 161 U.S. 519, 522–23 (1896), *rev’d on other grounds*, *Hughes v. Oklahoma*, 441 U.S. 322 (1979); see also, *Arnold v. Mundy*, 6 N.J.L. 1, 71 (1821) (Justinian applied the public trust to “the air, the running water, the sea, the fish, and the wild beasts . . .”).

⁶² Reed, *supra* note 58, at 111.

⁶³ Sax, *Liberating the Public Trust Doctrine*, *supra* note 29, at 186; see also Johanna Searle, Note, *Private Property Rights Yield to The Environmental Crisis: Perspectives on the Public Trust Doctrine*, 41 S.C. L. REV. 897, 899 (1990) (unlike today’s public trust doctrine Roman public trust law did not provide a means for the public to obtain legal relief against the state).

in the foundation that ancient society laid for the policy that there are certain things, "by the law of nature . . . common to mankind."⁶⁴

C. *English Roots*

In Medieval England, as in Rome, common water rights continued to be essential to commerce and navigation, but the public now was faced additionally with the need for land for grazing and hunting.⁶⁵ The early English legal right of access is different from the Roman public trust doctrine in that all "public" lands were owned exclusively by the King, rather than by everyone or no one as in Rome.⁶⁶ To support the feudal economy, however, the King had to grant to the public a legal right of access to use his land for grazing, hunting, fishing, and foraging.⁶⁷ This interest was designed not to protect natural resources from overuse, but rather to ensure that the King did not hoard all the natural resources.⁶⁸

Like Roman public trust law, the importance of Medieval English law is not in its precedent, which has little relevance today.⁶⁹ Rather the importance of the history of the public trust doctrine in Medieval England is to understand the origins of the idea of common ownership of natural resources.⁷⁰

D. *Beginnings of The Public Trust Doctrine in America*

With the American Revolution, wildlife, or "ferae naturae," previously owned by the King, passed into the possession of the people of the newly independent states by virtue of the "equal footing doctrine."⁷¹ The states inherited the King's duty of holding public re-

⁶⁴ SANDERS, *supra* note 59, at 158.

⁶⁵ See Sax, *Liberating the Public Trust Doctrine*, *supra* note 29, at 190 (peasants often subsisted on what they could gather from the Medieval commons).

⁶⁶ Searle, *supra* note 63, at 899-900.

⁶⁷ PLATER ET AL., *supra* note 35, at 366 (quoting Joseph L. Sax, *Defending the Environment: A Strategy for Citizen Action*, 163-65 (1970)) [hereinafter Sax, *Defending the Environment*].

⁶⁸ Rieser, *supra* note 48, at 415.

⁶⁹ Sax, *The Public Trust Doctrine*, *supra* note 12, at 485. Sax comments that "[o]nly the most manipulative of historical readers could extract much binding precedent from what happened a few centuries ago in England." *Id.*

⁷⁰ *Id.*

⁷¹ See Searle, *supra* note 63, at 902. The equal footing doctrine held that the original thirteen states and those succeeding them were given rights equal to those previously held by the King within the states' borders. *Id.* at 902 n.45.

sources in trust for the people.⁷² The famous case of *Pierson v. Post*⁷³ illustrates, however, that as in England, the prevalent concern with wildlife in early American society was with the possessing of animals as private property rather than with the protection of animals as a public resource.⁷⁴ In *Pierson v. Post*, a gentleman hunter loses the fox he had chased all day with his hounds to a "saucy intruder" who easily captures the fox in its exhausted state.⁷⁵ The hunter brings suit for the possession of the fox's pelt, but is unsuccessful because the standard of ownership is held to be the actual deprivation of the animal's natural liberty.⁷⁶ *Pierson v. Post* reflects the belief among Americans at this time that there was an endless frontier and that the wilderness was not a precious resource to be protected, but rather "an enemy to be conquered and tamed."⁷⁷ There appeared to be a never-ending supply of raw materials and, as Professor Sax comments, to the extent "land [was] doing something—for example, harboring wild animals—. . . getting rid of the natural, or at least domesticating it, was a primary task of the European settlers of North America."⁷⁸

E. *The Growth of the Public Trust in America*

With Americans' discovery that the endless frontier was an illusion, came the development of the public trust doctrine as a tool of conservation.⁷⁹ The frontier mentality of a land of infinite resources, where one could make a mistake and move onto fresh ground, led to a vision

⁷² See, e.g., *Port of Seattle v. Oregon & Washington R.R. Co.*, 255 U.S. 56, 63, 65 (1921) (Washington became owner of the navigable waters within its boundaries upon becoming a state.); *McCready v. Virginia*, 94 U.S. 391, 392–94 (1876) (Virginia holds the beds of its navigable waters and the fish within them "[s]o far as they are capable of ownership while running," in trust for the common benefit of its citizens.).

⁷³ 3 Cai. T. R. 175 (N.Y. Sup. Ct. 1805).

⁷⁴ Wild fox seen as "a wild and noxious beast," "cunning and ruthless," and "a pirate," whose death was a benefit to society. *Id.* at 180–81.

⁷⁵ *Id.* at 175, 181.

⁷⁶ *Id.* at 175.

⁷⁷ Campbell, *supra* note 19, at 74; see also PLATER ET AL., *supra* note 35, at 412. The public trust doctrine addresses the prospect, hard for many Americans to face, that perhaps private property owners do not have the right to do anything they want with their land. See PLATER ET AL., *supra* note 35, at 412.

⁷⁸ Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1442 (1993).

⁷⁹ Sax, *The Public Trust Doctrine*, *supra* note 12, at 547. Sax describes the evolution of much public trust law as "[a]n effort to retreat from the excessive generosity of early legislatures and public land management agencies." *Id.*

of our resources as disposable.⁸⁰ This vision was exposed as false and Americans were faced with the phenomenon of the "tragedy of the commons."⁸¹ While the public trust doctrine initially had been used to allow public access to natural resources, the doctrine shifted to a preservationist role.⁸²

The extension of the public trust doctrine in American case law parallels the growing public desire to protect the country's remaining natural resources. The earliest American cases mentioning the public trust doctrine extended the doctrine beyond its traditional focus on water rights. The Pennsylvania Supreme Court in the 1810 case of *Carson v. Blazer* extended the British recognition of public rights in the ocean and navigable waters—those waters the King did not own under British law—to nonnavigable inland waterways.⁸³ Nonnavigable inland waterways were privately owned in England and the American inclusion of nonnavigable inland waterways in the public trust was a significant extension of public rights.⁸⁴ The New Jersey Supreme Court adopted this extension of the public trust doctrine in the 1821 case of *Arnold v. Mundy*.⁸⁵ Harking back to the language of the Emperor Justinian and the idea that natural resources are *res communes* and *res nullius*,⁸⁶ the court held that plaintiff Arnold's purchase of Raritan Bay was subject to a prior common public property right to use the bay.⁸⁷ In *Martin v. Wadell*, an 1842 case concerning property rights in oyster beds in the same Raritan Bay, the United States Supreme Court affirmatively abolished the traditional British restriction that

⁸⁰ PLATER ET AL., *supra* note 35, at 412.

⁸¹ See *id.* at 33–40. The "tragedy of the commons" explains how people faced with a finite resource will continue to place demands on the resource until it is depleted completely. *Id.* at 34. Although the end result is disaster, if the first person had not placed the added demand on the common resource, a second person would have, and would have gotten the immediate benefit, therefore in the short run it makes sense to overload the resource. *Id.*; see generally, Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

⁸² See Brady, *supra* note 46, at 631. The public trust doctrine's initial emphasis on public access to resources was a factor in precipitating the tragedy of the commons. See *id.* Today, the focus of the public trust doctrine is on preservation of natural resources rather than on their use. See *id.* The idea that public resources should be protected from over use by privatization takes from the public its right to enjoy nature. See *id.*; but see R. Prescott Jaunich, *The Environment, The Free Market, and Property Rights: Post-Lucas Privatization of the Public Trust*, 15 PUBLIC LAND L. REV. 167, 192 (1994) (praising the British and Scottish custom of charging up to £100 a day for fishing in private, non-tidal waters).

⁸³ *Carson v. Blazer*, 2 Binn. 475, 475 (Pa. 1810).

⁸⁴ See *id.* at 476.

⁸⁵ 6 N.J.L. 1, 70–71 (1821).

⁸⁶ See *supra* notes 52–57 and accompanying text.

⁸⁷ *Arnold*, 6 N.J.L. at 71.

waters need to be affected by tides to be covered by the public trust doctrine.⁸⁸ These three early cases illustrate how the American courts, basing their reasoning on the Roman roots of the public trust doctrine, extended the public trust doctrine further than the English courts, which had been limited by the fact that ownership was vested in the King rather than in the people.

The principles of the public right to access certain water beds relied on in *Carson*, *Arnold*, and *Martin* were further brought to light in *Illinois Central v. Illinois*.⁸⁹ *Illinois Central* is the most well-known example of a state regretting its generosity with public lands.⁹⁰ In 1869, the Illinois legislature gave a two-mile-wide radius of land around Lake Michigan to the Illinois Central Railroad.⁹¹ By 1873, the legislature regretted giving away this extremely valuable land.⁹² The legislature relied on the public trust doctrine in its claim that the gift was invalid.⁹³ The legislature argued that it had not had the authority to abdicate control over the navigable waters of Lake Michigan because the legislature was merely a trustee of the land.⁹⁴ The United States Supreme Court agreed, holding that the land was “[h]eld in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein freed from the obstruction or interference of private parties.”⁹⁵

Illinois Central stands for the proposition that where a government does something with a public resource that appears to favor private interests over the public interests the government is supposed to be holding in trust, the Court will regard that decision with great skepticism.⁹⁶ This watershed case brought to the fore three related principles of the public trust doctrine:

[f]irst, that certain interests—like the air and sea—have such an importance to the citizenry as a whole that it would be unwise to

⁸⁸ See *Martin v. Wadell*, 41 U.S. 367, 368; see also Harry R. Bader, *Antaeus and the Public Trust Doctrine?: A New Approach to Substantive Environmental Protection in the Common Law*, 19 B.C. ENVTL. AFF. L. REV. 749, 751 (1992).

⁸⁹ 146 U.S. 387 (1892).

⁹⁰ Sax, *The Public Trust Doctrine*, *supra* note 12, at 489 (Sax termed *Illinois Central* “the lodestar in American public trust law”).

⁹¹ *Id.*

⁹² *Id.*

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ Sax, *The Public Trust Doctrine*, *supra* note 12, at 489–90 (quoting *Illinois Central v. Illinois*, 146 U.S. 387, 452 (1892)).

⁹⁶ *Id.* at 490.

make them the subject of private ownership. Second, that they partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status. And finally, that it is a principle purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted private benefit⁹⁷

These three principles discussed by the Supreme Court in *Illinois Central* serve as the basis for the expansion of the public trust doctrine in modern American public trust law.⁹⁸

The protection of wildlife fits well within these three principles. First, wildlife, like the air and sea, is of great importance to citizens as a whole. Aside from the spiritual value of wildlife to many as "God's creatures," some wildlife gives great aesthetic pleasure, and has been shown to have scientific value to humans.⁹⁹ Second, wildlife is the "bounty of nature," as its existence has nothing to do with "individual enterprise."¹⁰⁰ Finally, ensuring that wildlife is "freely available" for the enjoyment of the public depends on careful management by the government as trustee.

F. *Current Law on Public Trust and Wildlife*

Beginning in the 1960s, the state of the environment became a public concern, and by the 1970s and 1980s this concern was being translated into law.¹⁰¹ Most notable for seeking to protect wildlife are the Endangered Species Act (ESA) of 1973¹⁰² and the Marine Protection, Research and Sanctuaries Act (MPRSA) of 1988.¹⁰³ Environmentally conscious legislative acts have been labeled "trustee statutes" by one commentator in recognition of the fact that the purpose behind the statutes is to oppose wanton private use of natural resources that destroy the public "estate."¹⁰⁴

⁹⁷ PLATER ET AL., *supra* note 35, at 366 (quoting Sax, *Defending the Environment*, *supra* note 67, at 163-65).

⁹⁸ See Searle, *supra* note 63, at 901 (the principles of *Illinois Central* are the essentials of modern day public trust litigation).

⁹⁹ Bader, *supra* note 88, at 755. Bader states that "[a]n overly simplified biotic community no doubt would lack many of the qualities and vital forces upon which we depend for sound bodies and minds." *Id.*

¹⁰⁰ PLATER ET AL. *supra* note 35, at 366 (quoting Sax, *Defending the Environment*, *supra* note 67, at 163-65).

¹⁰¹ Chadwick, *supra* note 7, at 7.

¹⁰² 16 U.S.C. § 1531 (1994).

¹⁰³ 16 U.S.C. §§ 1431-45 (1994).

¹⁰⁴ Campbell, *supra* note 19, at 74-75.

Concurrent with the fostering of environmentally conscious legislation and the growing recognition that there are public rights and duties in natural resources, came the further expansion of the public trust doctrine.¹⁰⁵ As discussed above, early American public trust cases abandoned the traditional English rules which found a public trust interest only in navigable water or water subject to tides.¹⁰⁶ With the re-introduction of the public trust doctrine by Professor Sax in 1970,¹⁰⁷ there was a far more dramatic expansion of the doctrine. In the 1970s and 1980s, the public trust doctrine was applied far beyond water to parks,¹⁰⁸ archaeological artifacts,¹⁰⁹ beach access over uplands,¹¹⁰ critical upland areas surrounding a redwood forest,¹¹¹ trees damaged by oil spills,¹¹² and wildlife.¹¹³ At present, the question of just how expansive the public trust doctrine can be, remains open.¹¹⁴ Once the doctrine was accepted as transcending merely a limitation on water rights, it arguably protected all natural resources.¹¹⁵

III. A PUBLIC TRUST DOCTRINE REMEDY FOR THE "TAKINGS" DILEMMA

A. *The Public Trust Doctrine and "Takings"*

The tradition of the public trust conflicts directly with the far more widely known and highly valued tradition of private property.¹¹⁶ Many people feel strongly that they have a right to defend their property

¹⁰⁵ Brady, *supra* note 46, at 631.

¹⁰⁶ See *supra* notes 79-100 and accompanying text.

¹⁰⁷ PLATER ET AL., *supra* note 35, at 374.

¹⁰⁸ Paepcke v. Public Bldg. Comm'n, 263 N.E.2d 11, 18-19 (Ill. 1970) (holding that parklands were in trust for the people, but that using parklands for a school was not obviously against the interests of the trust); Gould v. Mount Greylock Reservation Comm'n, 215 N.E.2d 114, 125-26 (Mass. 1966) (holding that a 1953 legislative agreement to lease Reservation for ski resort construction was a violation of public trust doctrine since public interest is in preserving the unspoiled natural forest, not in having it sold for a private commercial venture).

¹⁰⁹ Wade v. Kramer, 459 N.E.2d 1025, 1027 (Ill. App. 4 Dist. 1984).

¹¹⁰ Matthews v. Bay Head Imprvm't Ass'n., 471 A.2d 355, 360-63 (N.J. 1984), *cert. denied*, 469 U.S. 821 (1984).

¹¹¹ Sierra Club v. Department of the Interior, 398 F. Supp. 284, 292-93 (N.D. Cal. 1975), *modified*, 424 F. Supp. 172 (1976).

¹¹² Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni, 628 F.2d 652, 671 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

¹¹³ In re Stuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980).

¹¹⁴ PLATER ET AL., *supra* note 35, at 394.

¹¹⁵ See *id.* Professor Plater comments that "[o]nce the public trust genie has been released from the bottle . . . it arguably can cast its shadow over situations previously unknown." *Id.*

¹¹⁶ Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 ENVTL. L. 369, 415 (1994). Meltz states that "[w]hile property rights are well

from any outside intrusions.¹¹⁷ Other people believe that the cost of public progress should be borne by the community at large which benefits from conservation and protection of private land, and not by a few unfortunate individuals.¹¹⁸ However reasonable this latter view may seem, as Professor Sax explains, “[a]ny attempt to apply this concept to property assertedly owned by the whole public is plainly incongruous.”¹¹⁹

Key to understanding the public trust is recognition that the conflict is between the survival of our common natural resources and individual economic interests; not, as Professor Huffman sets it up, between “new public recreational rights” and private property.¹²⁰ Although Huffman is correct that preventing the government from taking private property without compensation is a constitutional right essential to our system of government, Huffman fails to realize that the government has the additional duty to protect and manage property that is lawfully owned by us all.¹²¹ The major implication of the public trust doctrine for private property rights—specifically the potential of the doctrine to cause unexpected economic losses—has led to resistance to its expansion.¹²²

B. Phillips Petroleum Co. v. Mississippi

The earlier holdings of *Carson v. Blazer*,¹²³ *Arnold v. Mundy*,¹²⁴ *Martin v. Wadell*,¹²⁵ and *Illinois Central v. Illinois*,¹²⁶ which staked

analyzed in our legal and moral tradition, our ethical duties to endangered species are novel and not universally accepted.” *Id.*

¹¹⁷ See Lauri Alsop, Note, *The Right to Protect Private Property*, 21 ENVTL. L. 209, 227–29 (1991).

¹¹⁸ Sax, *The Public Trust Doctrine*, *supra* note 12, at 479. On the other hand, Professor Huffman challenges the expansion of the public trust doctrine on just this front, stating: “[a]s the environmentalists are fond of saying, there is no such thing as a free lunch. The question is whether the lunch will be paid for by those who eat it or by those whose property is taken without compensation. It is in the public interest that it be the former.” James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171, 210 (1987) [hereinafter Huffman, *Myth of Public Rights*].

¹¹⁹ Sax, *The Public Trust Doctrine*, *supra* note 12, at 479.

¹²⁰ Huffman, *Myth of Public Rights*, *supra* note 118, at 207.

¹²¹ Sax, *The Public Trust Doctrine*, *supra* note 12, at 479.

¹²² See PLATER ET AL., *supra* note 35, at 405–06. Professor Plater comments that “[t]he public trust doctrine has major implications for private property rights . . . the trust doctrine can create unexpected economic losses, anger, and political backlash.” *Id.*

¹²³ 2 Binn. 475 (Pa. 1810).

¹²⁴ 6 N.J.L. 1 (1821).

¹²⁵ 41 U.S. 367 (1842).

¹²⁶ 146 U.S. 387 (1892).

out the territory for the public trust in waters regardless of the traditional requirements of navigability, were confirmed in a modern-day setting with the United States Supreme Court's decision in *Phillips Petroleum Co. v. Mississippi*.¹²⁷ The dispute between Phillips Petroleum and the State of Mississippi occurred when the State granted oil and gas leases to private parties in land underneath a bayou that Phillips Petroleum had held title to for over one hundred years.¹²⁸ In what the dissent held to be a "radical expansion of the historical limits of the public trust,"¹²⁹ the United States Supreme Court held that the State's assertion of the public trust in the bayou was valid despite Phillips Petroleum's claim that its settled private expectations were upset.¹³⁰ The Court held that lands under tidal waters were held in public trust by the State.¹³¹ The rejection of Phillips Petroleum's settled expectations argument, despite the fact that the company had paid taxes on the land for more than a century, is indicative of the power of the public trust.¹³²

The Supreme Court's decision in *Phillips Petroleum* gave the public trust doctrine the authority it needed to face its most powerful contestor—private property rights protected by the Fifth Amendment. In recognizing that some assets cannot be taken without special permission from the state, the Court in *Phillips Petroleum* "fortif[ied] the operation of the trust as a state tool for economic and environmental control of significant resources [and legitimized] legislatures and activists who choose to assert the public interest more forcefully in an age of ever-increasing property conflicts."¹³³

C. Lucas v. South Carolina Coastal Council¹³⁴

A brief review and interpretation of the current takings law is helpful to gain an understanding of the relationship of the public trust doctrine to takings. The Fifth Amendment to the United States Constitution requires that just compensation be provided for private

¹²⁷ 484 U.S. 469 (1988).

¹²⁸ *Id.* at 472.

¹²⁹ *Id.* at 493 (O'Connor J., dissenting).

¹³⁰ *Id.* at 481–84.

¹³¹ *Id.* at 475.

¹³² See Searle, *supra* note 63, at 902–03 (explaining the serious implications of *Phillips Petroleum* on the "right" of private landowners to do what they want with their land).

¹³³ *Id.* at 904 (quoting Stephen A. DeLaw, Note, *Phillips Petroleum Co. v. Mississippi and the Public Trust Doctrine: Strengthening Sovereign Interest in Tidal Property*, 38 CATH. U. L. REV. 571, 597–98 (1989)).

¹³⁴ 112 S. Ct. 2886 (1992), *on remand*, 424 S.E.2d 484 (S.C. 1992).

property taken for public use.¹³⁵ Prior to Justice Oliver Wendell Holmes's interpretation of the takings clause in *Pennsylvania Coal Co. v. Mahon*¹³⁶ in 1922, courts found compensable takings only where there were "direct appropriations" of property or the "functional equivalent of a practical ouster of possession."¹³⁷ In *Pennsylvania Coal*, Justice Holmes recognized that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,"¹³⁸ but held that the general rule should be that if a regulation goes "too far" there is a taking.¹³⁹ This vague and abstract standard was solidified by holdings in the 1970s that found regulations that effect permanent physical invasions on private property go "too far," as do regulations that deny a private property owner "*all* economically viable use,"¹⁴⁰ of land even in the absence of a permanent physical invasion.¹⁴¹

The 1992 Supreme Court case *Lucas v. South Carolina Coastal Council*, further defined when regulations constitute governmental takings.¹⁴² In 1986, the plaintiff Lucas had purchased two beachside lots on the Isle of Palms, a barrier island off of Charleston, South Carolina, for \$975,000.¹⁴³ Lucas was prevented from fulfilling what he claimed were plans to build on the lots, when, in 1988, South Carolina passed the Beachfront Management Act, forbidding further development of the fragile barrier beaches.¹⁴⁴ Justice Scalia, writing for the majority, held that the statute's prohibition of development, although made to protect a fragile natural area, was a "taking" of Lucas's two beachside lots because he no longer had any profitable use for the lots.¹⁴⁵

On its face, *Lucas* does not bode well for the public trust doctrine: by holding that Lucas had a right to full compensation for his property, the Supreme Court seemed to restrict the circumstances under

¹³⁵ U.S. CONST. amend. V.

¹³⁶ 260 U.S. 393 (1922).

¹³⁷ *E.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435–40 (1982).

¹³⁸ *Pennsylvania Coal*, 260 U.S. at 413.

¹³⁹ *Id.* at 415.

¹⁴⁰ See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 506 (1987) (emphasis added); *Pennsylvania Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138 (1978).

¹⁴¹ *Clajon Prod. Corp. v. Petera*, 854 F. Supp. 843, 851–52 (D. Wyo. 1994).

¹⁴² *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2889–2902 (1992), *on remand*, 424 S.E.2d 488 (S.C. 1992).

¹⁴³ *Id.* at 2889.

¹⁴⁴ S.C. CODE ANN. §§ 48–39–250–360 (Law Co-op. Supp. 1993).

¹⁴⁵ *Lucas*, 112 S. Ct. at 2898–99.

which state and federal governments can act to protect natural resources without being forced to compensate affected landowners.¹⁴⁶ Upon closer examination, however, two questions remain open, despite the fact that the Supreme Court appeared to refuse to provide laws furthering environmental protection any special exemption from liability for takings.¹⁴⁷ The first question is how much a private property right has to be infringed on for a taking to occur?¹⁴⁸ The answer to this question depends on what part of a parcel of land is looked at.¹⁴⁹ The second question is to what extent the landowner's proposed use must fit within the landowner's "reasonable" or "distinct investment-backed" expectations?¹⁵⁰ The Supreme Court held that an expectation is not "reasonable" if, due to "background principles of nuisance and property law," the expectation is not part of the title to the property to begin with.¹⁵¹ On remand, the Supreme Court of South Carolina found that there were no state principles of *nuisance* law that would forbid Lucas's development of his property.¹⁵² The state court however, ignored the second part of the exception for "background principles of *property* law," and did not analyze possible public trust rights in the beach front property.¹⁵³

The public trust doctrine has long been established in American law as a background principle of property law.¹⁵⁴ Therefore, under the *Lucas* exception for "background principles of property law," the public trust doctrine trumps the takings clause.¹⁵⁵ Property not private to begin with cannot be "taken" by protective governmental regulations.¹⁵⁶ As Professor Huffman, a critic of the public trust, laments:

¹⁴⁶ Sarahan, *supra* note 33, at 550.

¹⁴⁷ Meltz, *supra* note 116, at 407.

¹⁴⁸ Sarahan, *supra* note 33, at 555-56.

¹⁴⁹ See *Lucas*, 112 S. Ct. at 2894 n.7; see also PLATER ET AL., *supra* note 35, at 460 (arguing that the baseline for determining whether there has been a taking should be the *entire parcel* of property not just the regulated area).

¹⁵⁰ Sarahan, *supra* note 33, at 556.

¹⁵¹ *Lucas*, 112 S. Ct. at 2901-02.

¹⁵² *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484, 485-86 (S.C. 1992).

¹⁵³ PLATER ET AL., *supra* note 35, at Supp. 154. Professor Plater believes that "Justice Scalia's opinion invites continued definition of public trust rights as an integral part of the balance he calls for in *Lucas*." *Id.*

¹⁵⁴ See *supra* notes 79-100 and accompanying text.

¹⁵⁵ See Huffman, *A Fish Out of Water*, *supra* note 46, at 558-59 (Huffman, although critical of this interpretation of the public trust doctrine, provides a good summary of how the public trust doctrine trumps the takings clause).

¹⁵⁶ See *id.*

[b]ecause public trust rights are understood to predate other property rights, their status in relation to those other rights claims is always prior in time, and therefore, superior in right. There can be no claim that enforcement of a public trust right results in a taking because individual property rights are by definition subject to prior public rights Because the public trust right is prior, there is nothing to be taken from the individual.¹⁵⁷

The "mammoth exemption"¹⁵⁸ to the takings rule left by *Lucas's* recognition of traditional principles of property law should allow state governments to use the public trust doctrine to protect wildlife where the interests of wildlife and private property conflict.

Shortly after the *Lucas* decision, the Oregon Court of Appeals demonstrated the ability of the public trust doctrine to overcome the takings clause in *Stevens v. City of Cannon Beach*.¹⁵⁹ The plaintiffs in *Stevens*, like *Lucas*, were owners of vacant seaside lots.¹⁶⁰ The plaintiffs claimed that the City of Cannon Beach's refusal to allow the plaintiffs to build a sea wall had effected a taking of the plaintiffs' property by inverse condemnation because without the sea wall it was impossible for them to develop their lots.¹⁶¹ The Oregon Court of Appeals determined that there was no taking because the public's right to use the beach was senior, and thereby superior, to the property interests of the plaintiffs.¹⁶² The court reasoned that because the public had always had the right to walk on the beach, the denial of the permit for the sea wall did not take anything that was ever included in the plaintiffs' property rights.¹⁶³ The court thus concluded that no taking occurred under either the Oregon Constitution or the United States Constitution.¹⁶⁴

IV. INCLUDING WILDLIFE IN THE PUBLIC TRUST

Many legal scholars have predicted that the public trust doctrine eventually might become a useful tool for the protection of wildlife, but none have explored the issue in depth.¹⁶⁵ However, the ground-

¹⁵⁷ *Id.*

¹⁵⁸ Meltz, *supra* note 116, at 408.

¹⁵⁹ 835 P.2d 940, 941-42 (Or. App. 1992), *cert. denied*, 114 S. Ct. 1332 (1994).

¹⁶⁰ *Id.* at 941.

¹⁶¹ *Id.*

¹⁶² *Id.* at 942; *see* Jaunich, *supra* note 82, at 167 n.2.

¹⁶³ *See id.*, at 941-42.

¹⁶⁴ *Stevens*, 835 P.2d at 942.

¹⁶⁵ *See, e.g.,* Rieser, *supra* note 48, at 394; Searle, *supra* note 63, at 909; Bader, *supra* note 88,

work has long been laid for this development. As discussed above, the scope of the public trust doctrine has expanded consistently.¹⁶⁶ Although the public trust doctrine has been used in some cases to protect wildlife, in these cases wildlife has almost always been included as part of a larger context.¹⁶⁷ For example, many recent cases explicitly include the protection of wildlife under the umbrella of the public trust doctrine, but do so within the context of the protection of whole ecosystems.¹⁶⁸ Predators like wolves are part of a natural ecosystem.¹⁶⁹

A. *Setting the Stage for the Protection of Wildlife*

Contemporary commentators on the public trust doctrine have argued that the doctrine should be used as a tool for large-scale ecological preservation, rather than to target particular species or natural landmarks.¹⁷⁰ In her article, *Ecological Preservation as a Public Property Right*, Professor Alison Rieser argues that the United States Supreme Court's implicit recognition of the public trust doctrine's application to more than just water rights in *Illinois Central v. Illinois* and *Phillips Petroleum v. Mississippi* indicates that ecological boundaries actually may be replacing the old navigability tests of the public trust doctrine.¹⁷¹

The concentration on ecological boundaries first appeared in *Marks v. Whitney*, where the California Supreme Court held that Marks's title to land that was part of the San Francisco Bay was subject to

at 761; see also Meyers, *supra* note 21, at 724 (Meyers's article discusses the idea of expanding the public trust doctrine to include wildlife, but does so on a more theoretical than legal basis.).

¹⁶⁶ See *supra* notes 79–115 and accompanying text.

¹⁶⁷ See, e.g., *Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652, 674 (1st. Cir. 1980), *cert. denied*, 450 U.S. 912 (1981) (wildlife protected as part of ecosystem destroyed by an oil spill); *National Audubon Soc'y v. Superior Ct. of Alpine Cty. (Mono Lake)*, 658 P.2d 709, 711 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983) (wildlife protected as part of ecosystem of lake/reservoir); *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (en banc) (wildlife protected as part of ecosystem of tidelands).

¹⁶⁸ See, e.g., *National Audubon Soc'y*, 658 P.2d at 709 (court considered Mono Lake as an entire ecosystem); *Marks*, 491 P.2d at 374 (court considered San Francisco Bay as a whole "ecological unit").

¹⁶⁹ See PLATER ET AL., *supra* note 35, at 391. In Professor Plater's opinion "*Mono Lake* may stand for the proposition that the public trust doctrine is capable of reaching out and encompassing the ecological values of an entire functioning ecosystem." *Id.*

¹⁷⁰ Bader, *supra* note 88, at 755. Bader suggests the public trust doctrine be used to "maintain the health of natural systems." *Id.*

¹⁷¹ Rieser, *supra* note 48, at 405–06. Alison Reiser is an Associate Professor at the University of Maine School of Law and Director of the Marine Law Institute. *Id.* at 393.

protection by the state as part of the public trust.¹⁷² The court based its reasoning on principles of ecological preservation rather than on commerce.¹⁷³ The court further noted that the "growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state"¹⁷⁴ The San Francisco Bay should be preserved in its natural state so that the lands "may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and the climate of the area."¹⁷⁵ The court's emphasis on conservation in *Marks* is a departure from earlier use of the public trust doctrine, allowing public access to a resource.¹⁷⁶

National Audubon Society v. Superior Court of Alpine County (Mono Lake) relied successfully on the holding of *Marks* over ten years later to support the expansion of the public trust doctrine to protect the biotic community of Mono Lake.¹⁷⁷ At issue in *Mono Lake* was the scenic beauty and ecological value of the lake, rather than the lake's navigability.¹⁷⁸ Mono Lake is a saline lake fed by five fresh water tributaries.¹⁷⁹ In 1940, the Department of Public Works of the City of Los Angeles purchased a grant to appropriate virtually the entire flow of four of the five tributaries to provide water for Los Angeles.¹⁸⁰ By 1983, the diversion of the fresh water had caused the lake to drop and had increased the lake's salinity such that there were severe impacts on the wildlife dependent on the lake.¹⁸¹ The plaintiffs in *Mono Lake* brought suit to protect not rights of fishing,¹⁸² or navigation, but "the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds."¹⁸³ Relying expressly on the public trust doctrine, the California Supreme Court

¹⁷² *Marks*, 491 P.2d at 380.

¹⁷³ *Rieser*, *supra* note 48, at 407.

¹⁷⁴ *Marks*, 491 P.2d at 380.

¹⁷⁵ *Id.*

¹⁷⁶ See *supra* notes 71–78 and accompanying text.

¹⁷⁷ *National Audubon Soc'y v. Superior Ct. of Alpine Cty.*, 658 P.2d 709, 712 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983).

¹⁷⁸ *Id.* at 711.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *National Audubon Soc'y*, 658 P.2d at 711. Mono Lake is saline and supports only brine shrimp. *Id.*

¹⁸³ *Id.* at 719. The dropping water level connected the islands in the lake with the mainland, allowing predators to destroy the gull population. *Id.* at 716. The dropping water level also produced a fine salt dust that polluted the air. *Id.*

held that the original grant was not absolute and that Los Angeles's need for water had to be balanced against the severe impairment of the scenic beauty and ecological value of the lake.¹⁸⁴ According to the Court, the public trust interests in the wildlife and ecology of the lake were potentially more significant than Los Angeles's private property rights.¹⁸⁵

B. *Applying the Public Trust to Wildlife*

While it generally is accepted that the public trust doctrine has "evolved into an amphibian, moving easily from the waters onto shorelands,"¹⁸⁶ many people have doubts about whether the doctrine can "shed the fins, the scales and the webbed feet to climb upland into the forests and mountains."¹⁸⁷ Wildlife was always included in the package of property rights that no one can own—rights like water and air—that have been traditionally the domain of the public trust doctrine.¹⁸⁸ The United States Supreme Court recognized the inclusion of wildlife in the public trust in the 1896 case *Geer v. Connecticut*.¹⁸⁹ Despite the Supreme Court's reversal on the issue of state ownership of wildlife, the original application of the public trust doctrine to wildlife was affirmed and strengthened by the Supreme Court's holding in *Hughes v. Oklahoma*.¹⁹⁰

The idea of extending the public trust doctrine to wildlife was introduced in Gary Meyers's article, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*.¹⁹¹ Meyers suggests that we should move towards a less homocentric approach to wildlife preservation.¹⁹² Meyers argues that wildlife should be preserved for its own sake, rather than for its unknown potential

¹⁸⁴ *Id.* at 719–24.

¹⁸⁵ See Jaunich, *supra* note 82, at 180 (arguing that although at the time Los Angeles was granted water rights in 1940 the public trust doctrine was not generally accepted to cover wildlife or aesthetic values, the California Supreme Court considered these public trust interests to be greater than the private property interest given by the water rights grant).

¹⁸⁶ Reed, *supra* note 58, at 107.

¹⁸⁷ *Id.*

¹⁸⁸ SANDERS, *supra* note 59, at 158. Campbell, however, argues that, "[t]he trend in recent years has been to expand the Public Trust Doctrine to protect wildlife, non-navigable waters, and air, not covered traditionally by the doctrine." Campbell, *supra* note 19, at 83. This argument is flawed because wildlife, air, and non-navigable waters were traditionally covered. SANDERS, *supra* note 59, at 158.

¹⁸⁹ 161 U.S. 519, 523 (1896), *rev'd on other grounds*, *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

¹⁹⁰ 441 U.S. at 322.

¹⁹¹ Meyers, *supra* note 21, at 724.

¹⁹² *Id.*

benefits for humans.¹⁹³ Meyers sees the public trust as furthering this more worldly view by offering a forum that encompasses the value of wildlife apart from its economic value or lack thereof to humans.¹⁹⁴ Meyers stresses the physical similarities between water and wildlife,¹⁹⁵ and emphasizes that both wildlife and water cannot be owned by individuals and historically have been viewed as owned by the state in trust for the public good.¹⁹⁶ Looking back to the treatment of both wildlife and water in Roman law as *res nullius* or *res communis*,¹⁹⁷ Meyers argues that the public trust doctrine was always meant to include wildlife, but has artificially been limited to water by centuries of wrongful interpretations of courts.¹⁹⁸

While most courts have limited use of the public trust doctrine to cases concerning water rights,¹⁹⁹ a small minority have already opened the door for including wildlife in the public trust.²⁰⁰ In *Geer v. Connecticut*, the United States Supreme Court, upholding the constitutionality of a Connecticut statute prohibiting the transportation of game outside of state boundaries, looked back to the ownership classifications of Roman law and held that natural resources *including wildlife* belong in common to all citizens of a state.²⁰¹ The Court held that natural resources should be kept "as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good."²⁰² While *Geer* was overruled as a violation of the Commerce Clause in the 1979 case *Hughes v. Oklahoma*,²⁰³ the Supreme Court took the opportunity to affirm its application of the public trust doctrine to wildlife, stating that "the general rule we adopt in this case makes ample allowance for preserving . . . the legitimate state concerns for conservation and protection of wild animals underlying the 19th Century legal fiction of state owner-

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 726-27.

¹⁹⁵ *Id.* at 729.

¹⁹⁶ Meyers, *supra* note 21, at 729.

¹⁹⁷ See *supra* notes 52-57 and accompanying text.

¹⁹⁸ Meyers, *supra* note 21, at 728-29 n.23.

¹⁹⁹ See *supra* notes 79-100 and accompanying text.

²⁰⁰ See, e.g., *Geer v. Connecticut*, 161 U.S. 519, 519 (1896), *rev'd on other grounds*, *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Barrett v. State*, 116 N.E. 99, 99 (N.Y. 1917); *In re Steuart Transp.*, 495 F. Supp. 38, 38 (E.D. Va. 1980).

²⁰¹ *Geer*, 161 U.S. at 519, 522-23.

²⁰² *Id.* at 529.

²⁰³ 441 U.S. at 325.

ship.”²⁰⁴ The sentiment that wildlife is an integral part of the public trust and that wildlife should be protected by the government continues as a slim but constant thread running from even before *Geer* through the present.²⁰⁵

The Court of Appeals of New York relied on *Geer* in *Barrett v. State* and held that the New York legislature’s reintroduction of wild beaver into the Adirondacks was done in the state’s capacity as a trustee for the people, and was done for the interests of the public at large.²⁰⁶ The court held that:

[t]he police power is not to be limited to guarding merely the physical or material interests of the citizen. His moral, intellectual and spiritual needs may also be considered. The eagle is preserved, not for its use but for its beauty. The same thing may be said of the beaver. They are one of the most valuable of the fur-bearing animals of the state. They may be used for food. But apart from these considerations their habits and customs, their curious instincts and intelligence place them in a class by themselves. Observation of the animals at work or play is a source of never-failing interest and instruction. If they are to be preserved experience has taught us that protection is required.²⁰⁷

The court’s holding in *Barrett* is important because of the court’s use of the public trust doctrine to justify the protection of wildlife and because of the court’s focus on the importance of wildlife for reasons other than human consumption.²⁰⁸ The most important precedent set by *Barrett* however, is its holding—discussed below—that the reintroduction of the beavers did not constitute a taking by the state of the private property damaged as a result of this reintroduction.²⁰⁹

Another case frequently cited to support the proposition that the public trust doctrine extends to wildlife is *In re Steuart Transportation Co.*²¹⁰ This case addressed whether damages could be recovered by the State of Virginia and the federal government for more than 30,000 migratory birds destroyed in an oil spill.²¹¹ The party responsible for the oil spill, the Steuart Transportation Company, moved for summary judgment, arguing that neither the federal government

²⁰⁴ *Id.* at 335–36.

²⁰⁵ See Searle, *supra* note 63, at 910 n.15.

²⁰⁶ *Barrett v. State*, 116 N.E. 99, 100 (N.Y. 1917).

²⁰⁷ *Id.* at 101.

²⁰⁸ See *id.*

²⁰⁹ See *id.*

²¹⁰ 495 F. Supp. 38 (E.D. Va. 1980).

²¹¹ *Id.* at 39 (The spill occurred February 2, 1976 in the Chesapeake Bay.).

nor Virginia could claim compensation because neither party "owned" the birds.²¹² Conceding that the birds were owned by no one, Virginia and the United States argued that the government had the right to sue for damages because under the public trust doctrine, the government may act in its capacity as trustee to protect the public's interest in preserving natural wildlife resources.²¹³ In denying the defendant's motion for summary judgment, the United States District Court for Virginia held that the federal government and the states have a "[r]ight and duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of resources but from a duty owing to people."²¹⁴

Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni, further supports the proposition that wildlife is part of the public trust.²¹⁵ *S.S. Zoe Colocotroni* concerned an oil barge that ran aground on a reef off of the Puerto Rican coast.²¹⁶ In order to dislodge the boat, the crew dumped crude oil into the ocean, whereupon the crude oil drifted to the shore of a mangrove forest causing considerable damage to the flora and fauna of the area.²¹⁷ Puerto Rico brought suit to recover for the damage done to the wildlife, claiming that, as the public trustee of natural resources, the Commonwealth had a regulatory interest in wildlife.²¹⁸ The United States Court of Appeals for the First Circuit did not decide the issue as to whether Puerto Rico could recover under the public trust doctrine because it found that Puerto Rico had an independent right to conserve its natural resources.²¹⁹ Puerto Rico's independent right to recovery came under a statute authorizing the co-plaintiff, the Environmental Quality Board, power to recover for the total value of damages done to wildlife and other natural resources.²²⁰ The United States Court of Appeals for the First Circuit approved of the public interests served by the statute, commenting that:

[in] recent times, mankind has become increasingly aware that the planet's resources are finite and that portions of the land and sea which at first glance seem useless, like salt marshes, barrier reefs, and other coastal areas, often contribute in subtle but critical

²¹² *Id.*

²¹³ *Id.* at 40.

²¹⁴ *Id.*

²¹⁵ *Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652, 671 (1980), *cert. denied*, 450 U.S. 912 (1981).

²¹⁶ *Id.* at 657-58.

²¹⁷ *Id.* at 658.

²¹⁸ *Id.* at 671.

²¹⁹ *Id.*

²²⁰ *S.S. Zoe Colocotroni*, 628 F.2d at 671.

ways to an environment capable of supporting both human life and other forms of life on which we all depend.²²¹

From the court's recognition of the value of Puerto Rico's attempt to discourage the destruction of natural resources, it may be implied that had Puerto Rico not provided explicitly for recovery for damage to wildlife in the statute, the court would have considered favorably the Commonwealth's claim under the public trust doctrine.²²²

Cases such as *Zoe* and *In re Stewart Transportation Co.* have helped to establish a thin but definite thread of judicial precedent and support for the extension of the public trust doctrine to wildlife.²²³ In Roman times wildlife was seen as *res nullius*—owned by no one.²²⁴ The United States Supreme Court affirmed this status and concurrently affirmed the public trust doctrine in its holding in *Geer v. Connecticut* that wildlife is in trust for the benefit of the people.²²⁵ This holding and the policy of protecting natural resources that lies behind it has guided courts up to the present time.²²⁶ Due to growing concern over the destruction of natural resources, the public trust doctrine appears poised to reemerge as a useful tool not only in encouraging a less "homocentric" vision of the world as Meyers advocates,²²⁷ but also in its capacity as a background notion of property law to defeat wildlife takings claims.²²⁸

C. *The Public Trust Doctrine Immunizing "Takings" by Wildlife*

The power of the public trust doctrine has been underutilized due to mistaken notions that "the scope of the immunizing power of the public trust remains largely unquestioned and fully unresolved,"²²⁹ and that the public trust doctrine is based only on "tremendous mystical and romantic appeal."²³⁰ The fact, however, is that not only is the

²²¹ *Id.* at 674.

²²² *See id.*

²²³ *See supra* notes 186–222 and accompanying text.

²²⁴ *See supra* notes 52–57 and accompanying text.

²²⁵ *Geer v. Connecticut*, 161 U.S. 519, 529 (1896), *rev'd on other grounds*, *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

²²⁶ *See supra* notes 79–115 and accompanying text.

²²⁷ Meyers, *supra* note 21, at 727.

²²⁸ *See Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901–02 (1992), *on remand*, 424 S.E.2d 484 (S.C. 1992).

²²⁹ Stephen Tan, Note, *The Watchtower Casts No Shadow: Nonliability of Federal and State Governments For Property Damage Caused By Wildlife*, 61 U. COLO. L. REV. 427, 444 (1990).

²³⁰ Lazarus, *supra* note 60, at 632.

public trust doctrine solidly grounded in law, but its immunizing power has been proven and its scope continues to grow.²³¹

The public trust doctrine was used successfully to challenge a takings claim in the 1917 case, *Barrett v. State*.²³² *Barrett* concerned a suit by property owners against the State of New York for damage caused to valuable woodlands by the reintroduction of beavers.²³³ In holding for the state, the New York Court of Appeals found that there was no taking because, under the public trust doctrine, the government, in its capacity as trustee, had a right to reintroduce the animals.²³⁴ The court reasoned:

[w]herever protection is accorded [to wildlife] harm may be done to the individual. Deer or moose may browse on his crops; mink or skunks kill his chickens; robins eat his cherries. In certain cases the Legislature may be mistaken in its belief that more good than harm is occasioned. But this is clearly a matter which is confined to its discretion. It exercises a governmental function for the benefit of the public at large and no one can complain of the incidental injuries that may result.²³⁵

The court explained that the public trust overcame the takings claim because the state "owned" the beavers in its capacity as trustee and had a right to protect them for the benefit of all the people.²³⁶ The court recognized that the reintroduction incidentally had caused damage to private forests, but saw greater value in the beavers—"a species of natural wealth which without special protection would be destroyed."²³⁷

Modern legislatures should have the same confidence in their ability to regulate for the protection of wildlife as the State of New York had in 1917. There are fortunately, glimmers of a reemergence of this confidence. In *Clajon v. Petera*, the United States District Court for the District of Wyoming relied on the public trust doctrine in holding that a Wyoming statute regulating hunting was not a taking of plaintiff's private property rights.²³⁸ The defendants in *Clajon*, members

²³¹ See *supra* notes 116–64 and accompanying text.

²³² 116 N.E. 99, 100 (N.Y. 1917). See *supra* notes 206–09 and accompanying text for discussion of *Barrett*.

²³³ *Barrett*, 116 N.E. at 100.

²³⁴ *Id.* at 102.

²³⁵ *Id.* at 100.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Clajon Prod. Corp. v. Petera*, 854 F. Supp. 843, 850 (D. Wyo. 1994). The court refers to the public trust impliedly in its reliance on "an ancient property doctrine dating back to the earliest days of the common law." *Id.* at 852.

of the Wyoming Game and Fish Department, failed to argue for application of the public trust doctrine.²³⁹ The court independently decided that the holding of the United States Court of Appeals for the Tenth Circuit in *Mountain States Legal Foundation v. Hodel* was controlling, although neither party had cited to the case.²⁴⁰ Quoting from the Supreme Court's holding in *Geer v. Connecticut*, the 1896 case that explicitly found wildlife to be covered by the public trust,²⁴¹ the court found it "well settled that wild animals are not the private property of those whose land they occupy, but are instead a sort of common property whose control and regulation are to be exercised 'as a trust for the benefit of the people.'"²⁴² The court then held that, taking into account the Supreme Court's holding in *Lucas*, there was no physical taking of the plaintiffs' land because of the "ancient property doctrine dating back to the earliest days of the common law" which holds that animals are owned by no one, whereby the state is not responsible for the animals' actions.²⁴³ There was no regulatory taking because the court determined under *Hughes v. Oklahoma* and *Mountain States Legal Foundation v. Hodel* that the state as trustee has the power to regulate to protect wildlife for the benefit of the public at large.²⁴⁴

The District Court in *Clajon* supported its claim that there was no physical taking of the plaintiffs' property with reference to *Moerman v. State*.²⁴⁵ In *Moerman*, the First District Court of Appeals of California relied on the public trust doctrine, holding that there was no physical or regulatory taking of Moerman's property by statutorily protected tule elk which had damaged his fences and consumed his livestock's feed.²⁴⁶ Comparing the situation to that of the reintroduction of the beaver in *Barrett v. State*, the court held that the state's attempt to return the tule elk to areas where it was once 500,000 strong did not make the state responsible for the damage to Moerman's property.²⁴⁷ The court found it "[c]learly . . . unreasonable to argue that because the animals were once eliminated from Lake and

²³⁹ See *id.* at 850.

²⁴⁰ *Id.* (citing *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (*en banc*)), *cert. denied*, 480 U.S. 951 (1987).

²⁴¹ *Geer v. Connecticut*, 161 U.S. 519, 519 (1896), *rev'd on other grounds*, *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

²⁴² *Clajon*, 854 F. Supp. at 850.

²⁴³ *Id.* at 852.

²⁴⁴ *Id.* at 851.

²⁴⁵ 21 Cal. Rptr.2d 329 (Cal. App. 1 Dist. 1993), *cert. denied*, 114 S. Ct. 1539 (1994).

²⁴⁶ *Id.* at 332-35.

²⁴⁷ *Id.* at 333.

Mendocino Counties and driven to the brink of extinction, that they are now nothing more than a public improvement or pet, under the control of the state.”²⁴⁸ The affirmation of *Geer v. Connecticut*’s holding that the public trust doctrine does include wildlife, in *Barrett v. State*, in *Moerman*, and in *Clajon v. Petera*, indicates that the public trust doctrine may be on the brink of receiving the recognition it deserves. In states where use of the public trust doctrine has been established as a “background notion of property law,”²⁴⁹ the built-in loophole in *Lucas v. South Carolina Coastal Council* should permit governmental protection of wildlife without crippling compensation demands.

V. THE IMPOSSIBILITY OF “TAKINGS” BY WILDLIFE

Most courts have held that the government does not have to compensate private property owners for damage caused by wildlife.²⁵⁰ The rationale of these courts, however, has not focused on any one strong, articulable theory. Generally, courts that hold that damage caused by wildlife on private property is not a taking do so under a traditional takings analysis.²⁵¹ The courts investigate first, whether there has been a permanent physical taking—also known as a taking “per se”—and second, whether there has been a regulatory taking that has resulted in no economically viable remaining use of the property.²⁵² The problem with this traditional takings analysis is that while the analysis often has been successful in holding that animals cannot commit takings,²⁵³ the analysis itself has come under considerable attack. Most seriously, the analysis ignores the exception laid out in *Lucas v. South Carolina Coastal Council* for background principles of property law, such as the public trust doctrine, that have the potential to provide a much firmer defense of wildlife.

²⁴⁸ *Id.*

²⁴⁹ *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901–02 (1991), *on remand*, 424 S.E.2d 484 (S.C. 1992).

²⁵⁰ Jeffrey E. Thompson, Note, *Damage Caused by Reintroduced Wildlife: Should the Government be Held Accountable?*, 4 U. ILL. L. REV. 1183, 1183 (1992).

²⁵¹ See *supra* notes 131–41 and accompanying text.

²⁵² *Id.*

²⁵³ See, e.g., *Christy v. Hodel*, 857 F.2d 1324, 1334–36 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989) (no taking where protected grizzly bear ate sheep); *Clajon Prod. Corp. v. Petera*, 854 F. Supp. 843, 852–53 (D. Wyo. 1994) (regulations on hunting wildlife on private property not a taking); *Leger v. Louisiana Dep’t of Wildlife and Fisheries*, 306 So.2d 391, 394–95 (La. App. 1975) (no taking where birds and deer ate crops).

A. *Physical Takings*

In arguing that the presence of wildlife on private property is not a per se taking by physical occupation, the government has stressed the fact that it neither owns nor controls wildlife, and thus cannot be held responsible for any damage that wildlife may cause landowners.²⁵⁴ For example, in *Christy v. Hodel*, Christy, a sheep farmer, was fined \$2,500 for killing a grizzly bear to protect his sheep.²⁵⁵ The plaintiffs in *Christy* appealed the fine, claiming that there was a physical taking of their property because the sheep were “destroyed, killed, and rendered absolutely useless by the bear’s act.”²⁵⁶ The United States Court of Appeals for the Ninth Circuit acknowledged that the bears had physically taken the sheep, but held that the government was not responsible for the bears’ action.²⁵⁷ The plaintiffs then claimed that there was a physical taking because the protected grizzly bears were on the land as “governmental agents.”²⁵⁸ The United States Court of Appeals for the Ninth Circuit rejected the plaintiffs’ argument that the grizzly bears were on the land as “governmental agents” because of the protection afforded them under the Endangered Species Act and Montana grizzly bear regulations.²⁵⁹ The court stressed that the government’s protection of the grizzly bears did not result in government ownership or control.²⁶⁰

In response to the United States Court of Appeals’s flat rejection of the argument that protected animals are “government agents,” those advocating compensation for damage caused by wildlife have

²⁵⁴ See, e.g., *Christy*, 857 F.2d at 1335 (it is pure fantasy to talk of “owning” wild fish, birds, or animals); *Clajon*, 854 F. Supp. at 853 (wild animals are *ferae naturae* and cannot be owned by anyone unless physically possessed).

²⁵⁵ *Christy*, 857 F.2d at 1326–27. Christy bought land adjacent to Glacier National Park, in Glacier County Montana, from the Blackfeet Indian Tribe in 1982, intending to start a sheep ranch. *Id.* at 1326. During the eight-day period between July 1, 1982 and July 9, 1982 the bears killed twenty sheep, worth \$1,200. *Id.*

²⁵⁶ *Id.* at 1334 (emphasis in original).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*; see also *Clajon Prod. Corp. v. Petera*, 854 F. Supp. 843, 852 (D. Wyo. 1994) (wild animals’ presence on private property and consumption of livestock’s food not a taking); *Moerman v. State*, 21 Cal. Rptr.2d 329, 331 (Cal. App. 1 Dist. 1993) (reintroduced tule elk that destroyed plaintiff’s fences and consumed food intended for plaintiff’s livestock not “instrumentalities of the state” so no taking found). Courts also have rejected per se takings claims on the grounds that animals by their nature cannot constitute a permanent physical invasion because they “roam about freely and . . . are anything but permanent fixtures.” *Clajon*, 854 F. Supp. at 853.

²⁶⁰ *Christy*, 857 F.2d at 1335.

formulated more sophisticated arguments. One theory left open in *Christy* is whether wildlife specifically relocated by the government legitimately can be seen as "instrumentalities of the government."²⁶¹ One commentator has argued:

[b]ecause most reintroduction programs involve species that have been absent from an area for a period of time, the reintroduced wildlife will not be born or produced naturally in the region and will not be considered indigenous wildlife. As a result, the government should maintain responsibility for all the harm caused by the wildlife it releases.²⁶²

Another commentator, Geoffrey Harrison, has taken this theory a step further, suggesting that it is not necessary to prove that wild animals are "government agents" for there to be a physical taking.²⁶³ Harrison argues that if cable wiring²⁶⁴ and random passersby on the beach²⁶⁵ can be held to effect takings, then so too can wild animals, for a random passerby is no more permanent than an animal, and a cable box is no more a government agent than a bear.²⁶⁶ Under Harrison's theory, government ownership or lack thereof ceases to be a factor.²⁶⁷

The public trust doctrine makes a much stronger case than traditional takings analysis for holding that there can be no physical takings by wildlife. Although the government has been successful in defeating plaintiffs' claims of takings per se by wildlife by stating that the government neither owns nor controls wildlife and therefore should not be responsible for damage caused by wildlife, this position is, as outlined above, subject to arguably valid attack.²⁶⁸ The public trust doctrine should not be ignored when the Supreme Court's decision in *Lucas v. South Carolina Coastal Council* has made a special exception for "background notions of property law."²⁶⁹ Arguably, the public trust doctrine is a background notion of property law.²⁷⁰ According to the public trust doctrine, the presence of wildlife on private property

²⁶¹ *Id.* at 1335 n.9.

²⁶² Thompson, *supra* note 250, at 1206.

²⁶³ Geoffrey L. Harrison, Note, *The Endangered Species Act and Ursine Usurpation's: A Grizzly Tale of Two Takings*, 58 U. CHI. L. REV. 1101, 1114 (1991).

²⁶⁴ *Lorretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

²⁶⁵ *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 (1987).

²⁶⁶ Harrison, *supra* note 263, at 1114.

²⁶⁷ *Id.*

²⁶⁸ See *supra* notes 250-64 and accompanying text.

²⁶⁹ *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901-02 (1992), *on remand*, 424 S.E.2d 484 (S.C. 1992).

²⁷⁰ See *supra* notes 71-100 and accompanying text.

cannot constitute a taking.²⁷¹ Private landowners never have been understood to own the wildlife on their property.²⁷² Therefore, nothing is taken from landowners when they are prevented from destroying or killing animals.²⁷³ Likewise, the public trust doctrine overrides the argument that the government should be forced to compensate for reintroduced wildlife that causes damage to private property owners. Since a private property owner's land always has been subject to use by wildlife, driving the wildlife to extinction in an area should not result in compensation when efforts are made for its rehabilitation.²⁷⁴ Finally, the public trust doctrine overcomes the argument that wildlife, like a cable box or a random passerby on beachfront property, effects a taking because it is on private land only by governmental regulation and approval. Wildlife, unlike a cable box and unlike other people, always has had the prior, natural right to inhabit private land.

B. *Regulatory Takings*

The government focuses on traditional takings analysis in arguing that the Endangered Species Act²⁷⁵ and other federal and local wildlife protection acts²⁷⁶ do not constitute regulatory takings. The traditional test for a regulatory taking, as defined by Justice Scalia in *Lucas v. South Carolina Coastal Council*, is whether a "regulation denies all economically beneficial or productive use of land."²⁷⁷ In *Christy v.*

²⁷¹ Lynda Graham Cook, Note, *Lucas and Endangered Species Protection: When "Take" and "Takings" Collide*, 27 U.C. DAVIS L. REV. 185, 208-09 (1993).

Classifying wildlife and its habitat as a public trust resource is important because landowners do not own the rights to trust resources located on their property Since the trust inheres in all property interests, landowners take fee simple title to an implied servitude restricting uses inconsistent with the public trust Therefore the public trust embodies the type of limitation the *Lucas* Court exempted from takings claims.

Id.

²⁷² *Id.*; see *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1426 (10th Cir. 1986), cert. denied, 480 U.S. 951 (1987). "It is well settled that wild animals are not the private property of those whose land they occupy, but are instead a sort of common property whose control and regulation are to be exercised 'as a trust for the benefit of the people.'" *Hodel*, 799 F.2d 1423, 1426.

²⁷³ See *id.* at 1426.

²⁷⁴ See *id.* at 1426-27.

²⁷⁵ 16 U.S.C. §§ 1531-44 (1994).

²⁷⁶ See, e.g., WILD FREE-ROAMING HORSES AND BURROS ACT, 16 U.S.C. §§ 1331-40 (1994) (to protect wild horses from capture, branding, harassment, or death); CAL. FISH & GAME CODE § 3951 (West 1970) (to protect tule elk).

²⁷⁷ *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992), on remand, 424 S.E.2d 484 (S.C. 1992).

Hodel, the plaintiffs argued as an alternative to finding a taking per se, that there was a regulatory taking of their property.²⁷⁸ The Court of Appeals for the Ninth Circuit held that there was not a regulatory taking of Christy's property because the Endangered Species Act itself left Christy "in full possession of the complete 'bundle' of property rights to [his] sheep."²⁷⁹ The court differentiated between the unintentional effect of the act—the killing of the sheep—and its regulatory purpose of protecting endangered wildlife.²⁸⁰ Looking at the regulations themselves the court held that they neither "purport to take, or even to regulate the use of, the plaintiffs' property" adding, "[p]erhaps because plaintiffs recognize this fact, they choose to focus on the conduct of the bears."²⁸¹

Those who believe that the Endangered Species Act is merely an excuse for "unconstitutional, uncompensated" takings of private land have fought the ESA by proposing interpretations of the takings clause that require much less than a 100% taking of the whole property.²⁸² One such proposal, specifically targeted to oppose the Endangered Species Act, is The Just Compensation Act of 1993.²⁸³ The Just Compensation Act calls for federal compensation for "any diminution" in the value of property.²⁸⁴ As discussed above, the United States Supreme Court, in *Lucas v. South Carolina Coastal Council*, left open the issue as to how much a private property right has to be infringed upon before a taking occurs.²⁸⁵

The public trust doctrine diffuses the threat of legislation that would demand compensation for any diminution in property value. Just as the public trust doctrine can defeat the argument that wildlife can effect a physical taking, the doctrine also can defeat the argument that the Endangered Species Act and similar wildlife protection statutes create regulatory takings. Wildlife has existed on the earth longer than humans, and under the public trust doctrine this prior right to

²⁷⁸ *Christy*, 857 F.2d at 1334.

²⁷⁹ *Id.*

²⁸⁰ *Id.* Other examples of government regulations held not to effect takings despite their burden on certain individuals are the prohibition amendment, *Hamilton v. Kentucky Distilleries*, 251 U.S. 146, 156–57 (1919), and rent control, *Bowles v. Willingham*, 321 U.S. 503, 512 (1944).

²⁸¹ *Christy*, 857 F.2d at 1334.

²⁸² Bruce Babbitt, *The Endangered Species Act and "Takings": A Call for Innovation Within the Terms of the Act*, 24 ENVTL. L. 355, 357 (1994).

²⁸³ H.R. 1388, 103d Cong., 1st Sess. (1993).

²⁸⁴ Babbitt, *supra* note 282, at 357.

²⁸⁵ See *supra* notes 134–64 and accompanying text.

the land is recognized.²⁸⁶ When land is purchased, the species that live upon it are not included in the title.²⁸⁷ Therefore, government regulations protecting wildlife take nothing that the landowner can claim as his or her own.²⁸⁸ Furthermore, as Secretary of the Interior Bruce Babbitt points out, government could not function if it had to pay all those inconvenienced by regulatory actions for the benefit of the public at large.²⁸⁹

C. *A Return to The Gray Wolves*

The recent reemergence of the public trust doctrine in *Moerman v. State* and *Clajon v. Petera* should give the government more confidence in the validity of the reintroduction of wolves into Yellowstone Park.²⁹⁰ Like the tule elk in *Moerman*, the wolves once were plentiful in Yellowstone Park.²⁹¹ Due to federally sponsored plans of eradication, the species is now officially listed as endangered.²⁹² Proponents of the wolf reintroduction,²⁹³ including Secretary of the Interior Bruce Babbitt, see the reintroduction of the wolf to Yellowstone Park as a symbolic apology for past callousness to wildlife and an enhancement of Yellowstone as a national treasure.²⁹⁴

Counterposing these supporters, are local ranchers who have been vocal in their disapproval of the reintroduction of the wolves.²⁹⁵ Although the ranchers are in the minority, the government and public

²⁸⁶ See Holmes Rolston III, *Property Rights and Endangered Species*, 61 U. COLO. L. REV. 283, 300 (1990). Rolston comments that wildlife has occupied the earth for hundreds of thousands of years and "if anyone is a newcomer on the scene, it is the landowner, now so vociferously claiming his absolute property rights." *Id.*

²⁸⁷ Cook, *supra* note 271, at 208-09.

²⁸⁸ See Rolston, *supra* note 286, at 298. Rolston argues that "[i]f governments limit economic benefits because these threaten harm to general noneconomic values, then no compensation is required. People never had the right to do on their property what spills over and results in harm to other people." *Id.*

²⁸⁹ Babbitt, *supra* note 282, at 358.

²⁹⁰ *Clajon Prod. Corp. v. Petera*, 854 F. Supp. 843, 843 (D. Wyo. 1994); *Moerman v. State*, 21 Cal. Rptr.2d 329 (Cal. App. 1 Dist. 1993), *cert. denied*, 114 S. Ct. 1539 (1994).

²⁹¹ William K. Stevens, *Wolf's Howl Heralds Change for Old Haunts*, N.Y. TIMES, Jan. 31, 1995, at C1. The world population of wolves has been reduced from approximately one million to around 100,000. *Id.*

²⁹² *Id.*

²⁹³ The wolf recovery plan generated 160,000 public comments to the Fish and Wildlife Service, the greatest response to any federal action. The majority of commentators were supportive of the wolves reintroduction. See Milstein, *supra* note 18, at E-1.

²⁹⁴ See Jim Klobuchar, *Wolf Controversy An Ideological Geyser in Yellowstone*, STAR TRIB. Feb. 14, 1995, at 3B.

²⁹⁵ *Id.*

supporters of the wolves have gone to great lengths to placate them.²⁹⁶ The government reintroduced the endangered wolves to Yellowstone as a “nonessential experimental” population, a classification that allows the killing of wolves proved to have killed livestock.²⁹⁷ Defenders of Wildlife, a public conservation group, has set up a fund, largely supported by school children, from which ranchers are to be compensated for any losses.²⁹⁸ These placating compromises are not only ineffective in silencing the opposition, but they may be entirely unnecessary. Where the public trust doctrine is a background principle of property law, the public trust doctrine’s protection of wildlife may mean that government has not only a right to protect wolves or other endangered wildlife, but a duty to preserve them. The wolf should not stop being protected by the public trust doctrine once it attacks livestock.²⁹⁹ The public trust doctrine should not be undermined by unnecessary compromises. The public trust doctrine is an important factor for courts to consider in future takings analysis involving wildlife.

VI. CONCLUSION

Originating in Roman times, the idea of a public trust for resources that cannot be owned by individuals has taken on special meaning today when the resources the Emperor Justinian spoke of—the water, the air, and wildlife—are threatened by unforeseeable demands of human consumption.³⁰⁰ The public trust doctrine has developed dynamically over time, expanding from the past artificial limitation to water rights to the present day application to wildlife.³⁰¹ This exten-

²⁹⁶ See Chadwick, *supra* note 7, at 15. Chadwick points out that:

[c]ritics complain that the ESA too often blocks development. Yet statistics show that it ends up only modifying development. Out of 98,237 interagency consultations between 1987 and 1992, just 55 projects were stopped cold. Officials look first to federal lands and other public domains such as state parks to carry out protection and recovery efforts. But because wildlife is a public resource, the government has some authority to prevent the destruction of listed species on private property as well.

Id.

²⁹⁷ *Id.*

²⁹⁸ Milstein, *supra* note 18, at E1. Defenders of Wildlife has established a \$100,000 Wolf Compensation Fund to pay fair market value to every rancher verified to have lost livestock in wolf attacks. *Id.*

²⁹⁹ Livestock is not included under the public trust doctrine because livestock is not “ferae naturae”—wildlife belonging to no one—they are instead domesticated animals owned privately. See *supra* notes 71–78 and accompanying text.

³⁰⁰ See *supra* notes 52–64 and accompanying text.

³⁰¹ See *supra* notes 165–228 and accompanying text.

sion may allow the public trust to trump private claims of takings under the Fifth Amendment. The Supreme Court's decision in *Lucas v. South Carolina Coastal Council* particularly made exception for "background notions of property law," and the public trust doctrine appears to fit into this exception in many cases.³⁰² The idea that the public trust doctrine is an ancient romantic notion is false. It is potentially an effective modern day legal tool for promoting regulations protecting endangered wildlife.

³⁰² See *supra* notes 250–99 and accompanying text.